No. _____

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

OFFICE OF THE PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

JOHN N. KOESTER, JR., *Counsel of Record*
Assistant Prosecuting Attorney
100 Court Street, Suite 204
Jackson, MO 63755
(573) 243-2430
jnkoester@capecounty.us

Attorneys for Petitioner
State of Missouri

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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PETITION FOR A WRIT OF CERTIORARI

The State of Missouri respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported as *State v. McNeely*, 358 S.W.3d 65 (Mo.banc 2012), and can be found in the Appendix (hereinafter "App."), *infra*, 1a-22a. The order of the Missouri Supreme Court denying rehearing is not reported. App., *infra*, 47a-48a. The opinion of the Missouri Court of Appeals is not reported, but can be found at 2011 WL 2455571 (Mo.App. E.D.). App., *infra*, 23a-38a. The judgment of the trial court granting Respondent's motion to suppress evidence can be found in the Appendix. App., *infra*, 39a-46a.

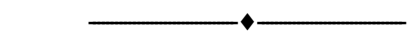
JURISDICTION

The Missouri Supreme Court entered its judgment on January 17, 2012. The Court denied petitioner's motion for rehearing on March 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



STATEMENT OF THE CASE

Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of a blood sample taken after his arrest for driving while intoxicated. The trial court granted the motion to suppress, holding that the blood sample was obtained in violation of Respondent's Fourth Amendment rights. App., *infra*, 39a-46a. Petitioner filed an interlocutory appeal. The Missouri Court of Appeals, Eastern District, reversed the ruling of the trial court. App., *infra*, 23a-38a. The Court of Appeals subsequently transferred the case to the Missouri Supreme Court, citing the general importance of the issue. *Id*. The Missouri Supreme Court affirmed the ruling of the trial court, holding that Respondent's Fourth Amendment rights were violated. App., *infra*, 1a-22a. Petitioner filed a motion for rehearing, which was denied. App., *infra,* 47a-48a.

A. Facts

On October 3, 2010, at approximately 2:08 A.M., Respondent was pulled over by a Missouri state highway patrolman for exceeding the speed limit. App., *infra*, 4a, 24a, 39a-40a. The patrolman noticed that Respondent displayed signs of intoxication, including bloodshot eyes, slurred speech, and the odor of alcohol on his breath. *Id.* These observations changed the nature of the patrolman's investigation from a routine traffic stop to a drunk-driving investigation. *Id.* When the patrolman asked Respondent to step out of his truck, he observed that Respondent was unsteady on his feet. The patrolman then administered a series of standard field-sobriety tests. After performing poorly on all of the tests, Respondent was placed under arrest for driving while intoxicated. *Id*.

The patrolman secured Respondent in his patrol car and began to transport him to the county jail. While in the patrol car the patrolman asked Respondent if he would agree to voluntarily provide a breath sample when they arrived at the jail. Respondent told the patrolman that he would refuse to provide a breath sample. App., *infra*, 4a-5a, 24a-25a, 39a-40a. The patrolman then decided to drive directly to a nearby hospital in order to obtain a blood sample to secure evidence of intoxication. *Id.* At the hospital the patrolman read an implied consent form to Respondent and requested a blood sample. Respondent refused to voluntarily consent to the blood test. *Id.* The patrolman then directed a hospital lab technician to draw a blood sample, which was collected as

evidence at 2:33 A.M. *Id.* Chemical analysis of the blood sample later revealed that Respondent's blood-alcohol content was 0.154 percent, well above the legal limit of .08 percent. *Id.*

The patrolman did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of Respondent's blood.[1] App., *infra*, 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves a delay, on average, of approximately two hours. (Record on Appeal: Tr. 26-27.) The generally accepted rate of elimination of alcohol in the bloodstream is between .015 and .020 percent per hour. (Record on Appeal: Tr. 20-21.)

[1] Although the patrolman had obtained search warrants in driving while intoxicated cases in the past, he did not attempt to obtain one in this case because he had read an article during a training session that stated a search warrant was no longer necessary due to a recent statutory amendment to the "refusal" provision of the Missouri implied consent law. App., *infra*, 4a-5a n.2. Prior to the amendment, the statute provided that if a person refused a chemical test, then "none shall be given." Mo. Rev. Stat. § 577.041.1 (Cum.Supp.2009). Effective on August 28, 2010, the phrase "none shall be given" was deleted from the statute. § 577.041.1 (Cum.Supp.2010). App., *infra*, 34a-38a, 43a-45a. Nonetheless, the Missouri Supreme Court found it unnecessary to address the issue of the statutory amendment because it held the Fourth Amendment was violated. App., *infra*, 21a n.9.

B. Procedural History

1. Cape Girardeau County Circuit Court

Respondent was charged by Information with driving while intoxicated in the Circuit Court of Cape Girardeau County, Missouri, in violation of Mo. Rev. Stat. § 577.010 (2000).[2] (Record on Appeal: Legal File 8-9.) Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of the blood sample taken after his arrest. Respondent claimed that the nonconsensual and warrantless blood sample was obtained in violation of his Constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.[3] (Record on Appeal: Legal File p. 12.)

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[2] Because Respondent had two prior convictions for driving while intoxicated, he was charged with a class D felony under Missouri law, which carries a maximum term of imprisonment of four years. A first time offense for driving while intoxicated is a class B misdemeanor, carrying a maximum punishment of six months in jail. Mo. Rev. Stat. §§ 558.011, 577.023 (Cum.Supp.2010).

[3] Respondent also alleged his right to be free from unreasonable searches and seizures under the Missouri Constitution was violated. (V.A.M.S. Const. Art. I, § 15.) Although the courts below did not mention the Missouri constitutional provision, it should be noted that the Missouri Supreme Court has held that Article I, Section 15, provides the exact same guarantees against unreasonable searches and seizures as under the Fourth Amendment, and thus, the same analysis applies to cases under the Missouri Constitution as under the United

(Continued on following page)

The trial court granted Respondent's motion to suppress evidence, holding that the warrantless blood draw violated the Fourth Amendment. App., *infra*, 39a-46a. Basing the ruling on its interpretation of this Court's decision in *Schmerber v. California*, 385 U.S. 757 (1966), the trial court held that the natural dissipation of alcohol in the bloodstream does not constitute a sufficient exigency to justify a warrantless blood draw in a routine driving while intoxicated case. App., *infra*, 42a-43a. While acknowledging that *Schmerber* upheld a nonconsensual and warrantless blood draw in a drunk driving case against a Fourth Amendment challenge, the trial court found that *Schmerber* was limited to the "special facts" of that case. *Id.*

The trial court maintained that *Schmerber* requires the existence of additional "special facts," other than the dissipation of alcohol in the bloodstream, before a warrantless blood draw may be justified. These "special facts" were identified by the trial court as a motor vehicle accident resulting in physical injuries requiring emergency medical treatment. Because Respondent was not involved in an accident, and because Respondent did not suffer physical injuries requiring emergency medical treatment, the trial court concluded that *Schmerber* did not apply. The trial court stated:

States Constitution. See *State v. Oliver*, 293 S.W.3d 437, 442 (Mo.banc 2009).

> The facts before this court are substantially different than the facts of *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established exigent circumstances, did not exist in this case to justify the warrantless search.

App., *infra*, 43a.

2. Missouri Court of Appeals, Eastern District

Petitioner filed an interlocutory appeal to the Missouri Court of Appeals, Eastern District. The Court of Appeals, in a unanimous 3-0 decision, issued a written opinion reversing the ruling of the trial court. App., *infra*, 23a-38a.

The Missouri Court of Appeals held that, in applying the exigent circumstances exception to the warrant requirement, "special facts" are not required to justify a warrantless blood draw. Instead, the

evanescent nature of blood alcohol evidence creates exigent circumstances such that no warrant is needed to conduct the search. App., *infra*, 33a. In its analysis, the Court of Appeals found the interpretation of *Schmerber* from other jurisdictions to be persuasive, including the Wisconsin Supreme Court in *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), and the Sixth Circuit in *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989). App., *infra*, 29a-31a. The Missouri Court of Appeals concluded:

> We have no reason to require 'special facts' in addition to the facts that the officer had ample cause to reasonably believe Defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

App., *infra*, 33a.

Citing the general interest and importance of the issue, however, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court. App., *infra*, 24a, 38a.

3. Missouri Supreme Court

The Missouri Supreme Court disagreed with the Court of Appeals and affirmed the ruling of the trial court in a *per curiam* opinion, holding that the nonconsensual and warrantless blood draw was a violation

of Respondent's Fourth Amendment rights. App., *infra*, 1a-22a.

The Missouri Supreme Court held that *Schmerber* was expressly limited to its facts, and, noting that the patrolman was not confronted with these same "special facts," concluded that exigent circumstances did not exist. App., *infra*, 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

App., *infra*, 3a.

To support its view that *Schmerber* was limited to its facts, the Missouri Supreme Court asserted that *Schmerber* explicitly warned against expansive interpretations. App., *infra*, 18a. The Court relied on the following language in *Schmerber*:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber, 384 U.S. at 772. The Missouri Supreme Court concluded that to allow a warrantless blood draw in the absence of "special facts" would be to ignore this Court's cautious limitation on the holding in *Schmerber*. App., *infra*, 19a.

In its analysis, the Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among other state courts of last resort in their respective interpretations of this Court's decision in *Schmerber*. The Missouri Supreme Court expressly disavowed the reasoning of other jurisdictions previously holding that the rapid dissipation of alcohol in the bloodstream constitutes a sufficient exigency to draw blood without a warrant, including the Wisconsin Supreme Court,[4] the Minnesota Supreme Court,[5] and the Oregon Supreme

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[4] *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993); *State v. Faust*, 682 N.W.2d 371 (Wis. 2004).

[5] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008); *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

Court.[6] App., *infra*, 16a-19a. Ultimately, the Missouri Supreme Court adopted the rationale of the Utah Supreme Court in *State v. Rodriguez,* 156 P.3d 771 (Utah 2007), and the Iowa Supreme Court in *State v. Johnson,* 744 N.W.2d 340 (Iowa 2008), where the courts held that *Schmerber* requires "special facts" beyond the natural dissipation of alcohol in the bloodstream in order to justify a warrantless search. App., *infra*, 10a-13a.

Petitioner filed a motion for rehearing, which was overruled by the Missouri Supreme Court on March 6, 2012. App., *infra*, 47a-48a.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Missouri Supreme Court Creates A Further Division Among State Courts Of Last Resort And Conflicts With The Federal Circuits

The ruling of the Missouri Supreme Court has further deepened the division among state courts of last resort on a fundamental Fourth Amendment issue. The ruling also conflicts with decisions of the Federal Circuits. The Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among state courts

[6] *State v. Milligan*, 748 P.2d 130 (Or. 1988); *State v. Machuca*, 227 P.3d 729 (Or. 2010).

of last resort in their respective interpretations of this Court's decision in *Schmerber*. Some courts have interpreted *Schmerber* broadly, holding that the natural dissipation of alcohol in the bloodstream is sufficient to create exigent circumstances justifying a warrantless blood draw in drunk-driving related crimes. Other courts have taken a narrow, more restrictive view, essentially holding that *Schmerber* is limited to its "special facts." This emerging conflict on a fundamental Fourth Amendment issue will likely continue to divide courts throughout the United States until this Court takes action to clarify the holding in *Schmerber*.

***Schmerber v. California*, 384 U.S. 757 (1966)**

In *Schmerber,* this Court considered whether a nonconsensual and warrantless blood test taken from a defendant suspected of driving while under the influence of intoxicating liquor violated the Fourth Amendment. There, defendant had been arrested at a hospital while receiving treatment for injuries suffered in an accident after his automobile skidded off the road and struck a tree. *Id.,* at 758, 759 n.2. At the direction of a police officer, a warrantless blood sample was withdrawn by a physician despite the fact that defendant refused to consent to the test. *Id.,* at 758-759. Chemical analysis of the blood sample revealed defendant was intoxicated. *Id.* A report of the analysis was admitted at trial over defendant's objection, resulting in a conviction for a misdemeanor

offense of driving under the influence of intoxicating liquor. *Id.,* at 759 n.1.

On appeal, defendant claimed that the nonconsensual and warrantless blood withdrawal violated his right to be free from unreasonable searches and seizures under the Fourth Amendment. This Court disagreed. Holding the warrantless blood test was a reasonable search and seizure under the Fourth Amendment, this Court first concluded that probable cause existed to arrest the defendant for driving under the influence of alcohol. *Id.,* at 768-769. Next, this Court turned its attention to whether a search warrant was required before taking the blood sample. Concluding the warrantless search was reasonable, this Court stated:

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that

> the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[7]

Id., at 770-771 [citation omitted]. This Court further concluded that the test itself was reasonable, noting that blood tests are a "highly effective means of determining the degree to which a person is under the influence of alcohol" and that such tests are commonplace and routine, involving "virtually no risk, trauma, or pain." *Id.* Finally, this Court found the test was performed in a reasonable manner in that the blood was taken by a physician in a hospital environment according to accepted medical practices. *Id.* The defendant's right under the Fourth Amendment to be free of unreasonable searches and seizures, therefore, was not violated. *Id.*, at 772.

Recently, a deep split has emerged among various courts applying conflicting interpretations of *Schmerber*.

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[7] Although the decision was cast in terms of the "search incident to arrest" exception to the warrant requirement, subsequent decisions of this Court have recognized *Schmerber* as falling under the exigent circumstances exception. See *United States v. Dionisio*, 410 U.S. 1, 8 (1973); *Winston v. Lee,* 470 U.S. 753, 759 (1985); *Kentucky v. King*, 131 S.Ct. 1849, 1857 n.3 (2011).

A. Courts holding that the natural dissipation of alcohol in the bloodstream is sufficient to create exigent circumstances justifying a warrantless blood draw under *Schmerber*

Wisconsin Supreme Court

In *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993) the Wisconsin Supreme Court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw as long as the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related crime, and there is a clear indication that the blood draw will produce evidence of intoxication. *Id.,* at 406. In reaching this conclusion, the Court noted that a "well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant." *Id.,* at 401. Analyzing this Court's decision in *Schmerber*, the Court stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of

> two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, at 402. The Court concluded that the most reasonable and logical interpretation of *Schmerber* was the first one set forth:

> A logical analysis of the *Schmerber* decision indicates that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's bloodstream diminishes over time. The fact that an accident occurred and that the defendant was taken to the hospital did not increase the risk that evidence of intoxication would be lost. A hospital trip to another location at which a medically qualified person is present is standard procedure for taking a blood sample in a drunk driving case, regardless of whether an accident occurred.

Bohling, at 402-403.

In *State v. Faust*, 682 N.W.2d 371, 378 (Wis. 2004), the Wisconsin Supreme Court reaffirmed that the exigency justifying a warrantless blood draw is the rapid metabolization and dissipation of alcohol in the bloodstream. There, the defendant was pulled over in a routine traffic stop, exhibited signs of intoxication, and was arrested for driving while intoxicated. *Id.,* at 374. The defendant consented to provide a sample of his breath for chemical analysis, which revealed his blood alcohol content was slightly above the legal limit. *Id.* Believing that he needed to secure additional evidence of intoxication, the arresting

officer requested the defendant to voluntarily provide a blood sample, which he refused. *Id.* Without attempting to obtain a search warrant, the officer then transported the defendant to a local hospital where a medical technician administered a blood test. *Id*.

The Wisconsin Supreme Court upheld the warrantless and nonconsensual blood test. The Court reiterated that "*Schmerber* stands for the proposition that the fact that alcohol rapidly dissipates in the bloodstream justifies an officer's belief that he is faced with 'an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence.'" *Faust*, at 377 (quoting *Schmerber*, 385 U.S. at 770). The Court stated:

> The fact that the police have obtained a presumably valid chemical sample of the defendant's breath indicating the defendant's level of intoxication does not change the fact that that the alcohol continues to dissipate from the defendant's bloodstream. The evidence sought 'remains on a course to be destroyed.'

Faust, at 378 [Citation omitted]. The Court concluded that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Id.,* at 379. Thus, "[t]he nature of the evidence sought, not the existence of other evidence, determines the exigency." *Id.*

Oregon Supreme Court

The Oregon Supreme Court likewise held that it is the evanescent nature of the evidence sought that constitutionally justifies the taking of a blood sample without a search warrant. *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988). In so holding, the Court first determined that the police officer did, in fact, have probable cause to believe that an analysis of the defendant's blood would yield evidence that he had committed an alcohol-related crime. *Id.,* at 134. The Court then turned its attention to whether the police were required to obtain a search warrant before ordering the blood draw, and ultimately concluded that the warrantless blood draw was justified under the exigent circumstances exception to the warrant requirement. *Id.* The Court stated, "[w]hen he was seized, the officers had probable cause to believe that defendant was a vessel containing evidence of a crime he had committed – evidence that was dissipating with every breath he took." *Id.* The Court noted that in order to accurately determine the level of alcohol in the suspect's blood at the time of the alleged crime, the police must obtain an initial sample of the suspect's blood with as little delay as possible. *Id.*

In reaching this conclusion, the Oregon Supreme Court analyzed this Court's decision in *Schmerber.* The Oregon Supreme Court interpreted the "special facts" existent in *Schmerber* to be the evanescent nature of alcohol in the blood, and the fact that the blood test was reasonable in that it was performed by a physician in a hospital environment according to

accepted medical practices. *Milligan*, at 135. The Oregon Supreme Court did not find that an accident resulting in physical injuries requiring emergency medical attention were "special facts" necessary to justify a warrantless blood draw. Instead, the Court found that *Schmerber* "relied on the exigency created by the evanescent nature of blood alcohol and the danger that important evidence would disappear without an immediate search." *Milligan*, at 135.

Recently, in *State v. Machuca*, 227 P.3d 729 (Or. 2010), the Oregon Supreme Court reiterated that the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw. *Id.,* at 736. There, the Court rejected an approach that would have required the State to prove that it could not have obtained a search warrant without sacrificing the evidence. *Id.* The Court concluded that the focus should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.* The Court acknowledged that, from time to time, there may be rare instances where a search warrant could be both obtained and executed in a timely fashion. *Id.* "The mere possibility, however, that such situations may occur from time to time does not justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count." *Id.* The Court reaffirmed the holding in *Milligan*, concluding that "when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent

nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing the evidence." *Machuca*, at 736.

Minnesota Supreme Court

The Minnesota Supreme Court held that the dissipation of alcohol in a defendant's blood creates a "single-factor exigent circumstance" that will justify a warrantless and nonconsensual blood draw. *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008). The Court based its holding on the imminent destruction of evidence, noting that with every passing minute, the most probative evidence is subjected to destruction by the body's natural processes. *Id.,* at 545. The Court stated, "[i]t is undisputed that as a result of the body's physiological processes, the blood-alcohol content in a defendant's blood dissipates with the passage of every minute." *Id.,* at 546. The Court rejected a "totality of the circumstances" approach that would require law enforcement officers to consider the length of delay in obtaining a search warrant in determining whether exigent circumstances exist. *Id.* The Court found that requiring an officer in the field to speculate on a range of other factors outside of the officer's control would place an unreasonable burden on law enforcement. *Id.,* at 549. Instead, the Court held that under "single-factor exigency" it is objectively reasonable to conclude that the alcohol content in a defendant's blood dissipates with the passage of time due to the human body's

natural, physiological processes. *Id.,* at 548. A warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant. *Id.* Since it is undisputed that the loss of the most probative evidence occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence. *Id.,* at 549.

The Minnesota Supreme Court found that its conclusion was consistent with *Schmerber* and subsequent decisions of this Court. The Court cited *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989), where this Court noted:

> [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible . . . the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

Shriner, at 547 (quoting *Skinner,* 489 U.S. at 623).

The Minnesota Supreme Court also addressed the argument that the judgment in *Schmerber* was limited "only on the facts of the present record" and did not permit "more substantial intrusions, or intrusions under other conditions." *Shriner*, at 547 n.9 (quoting *Schmerber,* 385 U.S. at 774). The Court

concluded that "[t]his language, however, is properly analyzed as indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving." *Shriner*, at 547 n.9.

In *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), the Minnesota Supreme Court reaffirmed that the evanescent nature of the evidence creates the conditions that justify a warrantless search. *Id.,* at 213. There, the defendant had been charged with misdemeanor offenses for driving while intoxicated and refusing a chemical test. *Id.,* at 205-206. The Court noted that whether the degree of the underlying offense constitutes a felony or a lesser crime is immaterial to the circumstances created by the dissipating blood-alcohol evidence. *Id.,* 213. Rather, it is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency. *Id.* The Court concluded that "no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense." *Id.,* at 214.[8]

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[8] The Ohio Supreme Court reached a similar conclusion in *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009). Discussing *Schmerber*, the Court stated, "[t]he United States Supreme Court has held that if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the driver's objection and without consent is admissible in evidence, even if no warrant has been obtained." *Id.,* at 1060. The Court found this is so because "delaying the test to get a

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United States Court of Appeals for the Sixth Circuit

In *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989), the Sixth Circuit upheld a warrantless blood draw against a Fourth Amendment challenge. The Court held that the search was reasonable because the officer had ample cause to believe the defendant was under the influence of alcohol, and because the method of testing was safe and reasonable. *Id.,* at 890. Reading *Schmerber* as an application of the exigent circumstances exception to the warrant requirement, the Sixth Circuit emphasized that the authorities in *Schmerber* had probable cause establishing that the results of the blood test would be positive. *Berry*, at 891. The Court found that because

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warrant would result in a loss of evidence." *Id.* Other state courts holding that the dissipation of alcohol in the bloodstream creates exigent circumstances under *Schmerber* include: the Arizona Supreme Court in *State v. Cocio*, 709 P.2d 1336, 1345 (Ariz. 1985) ("Because of the destructibility of the evidence, exigent circumstances existed. The highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time."); the Maine Supreme Judicial Court in *State v. Baker*, 502 A.2d 489, 493 (Me. 1985) ("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test."); and the Idaho Supreme Court in *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) ("The destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."). See also the Hawaii Supreme Court in *State v. Entrekin*, 47 P.3d 336, 348 (Hawai'i 2002), and the California Supreme Court in *People v. Thompson*, 135 P.3d 3 (Cal. 2006).

evidence of intoxication begins to dissipate promptly, it was evident that there were exigent circumstances justifying the warrantless blood draw. *Id*. Although the defendant in *Berry* was involved in a serious accident resulting in physical injuries, the Sixth Circuit did not identify these facts as critical factors in its analysis. Instead, the Court simply concluded, "[w]e find no constitutional violation in police direction of qualified medical personnel at a medical institution or facility without a warrant to administer a blood test when the police have probable cause to suspect that the results of the blood test would be positive." *Id.*[9]

[9] The Eighth Circuit has likewise relied on *Schmerber* to justify warrantless blood tests when the police have probable cause to conduct the tests. See *United States v. Prouse*, 945 F.2d 1017 (8th Cir. 1991), where the Court approved warrantless blood tests taken from defendants suspected of operating a commercial passenger airplane while under the influence of alcohol. Relying on *Schmerber*, the Court held that no warrant was needed because the "percentage of alcohol in the blood begins to diminish shortly after drinking stops." *Prouse*, at 1024 (discussing *Schmerber*, 384 U.S. at 770-771). See also *United States v. Eagle*, 498 F.3d 885 (8th Cir. 2007), where the Court found exigent circumstances exist when there is a risk of destruction of evidence, including a risk that a defendant's blood-alcohol content will dissipate because "the body functions to eliminate [alcohol] from the system." *Eagle*, at 893 (quoting *Schmerber*, 384 U.S. at 770-771).

United States Court of Appeals for the Fourth Circuit

United States v. Reid, 929 F.2d 990 (4th Cir. 1991), was a consolidation of two cases involving routine traffic stops on the George Washington Memorial Parkway. Both defendants showed signs of intoxication, failed field sobriety tests, and were arrested for driving while intoxicated. There were no accidents involved in either case, nor were there any physical injuries. The defendants argued that warrantless breath tests violated the Fourth Amendment. *Id.,* at 991-992. Relying on *Schmerber*, the Fourth Circuit held the warrantless breath tests were justified under the exigent circumstances exception to the warrant requirement. *Reid*, at 993. To support this position, the Fourth Circuit further relied on the decision of this Court in *Skinner, supra*, finding that *Skinner* "reiterated the notion that time is of the essence when there is a need to test alcohol in the body when it stated that 'the delay necessary to procure a warrant may nevertheless result in the destruction of valuable evidence.'" *Reid*, at 993 (quoting *Skinner*, 489 U.S. at 623).

The Fourth Circuit also rejected the argument that the availability of a procedure to obtain a search warrant over the telephone diminished the exigency. *Reid*, at 993. The Court examined the intricate requirements of obtaining such a warrant and concluded that the procedure did not alter the exigency of the situation. The Court stated, "[o]bviously, compliance

with these rules takes time. Time is what is lacking in these circumstances." *Id.*

B. Courts holding that *Schmerber* requires additional "special facts" other than the natural dissipation of alcohol in the bloodstream to create exigent circumstances justifying a warrantless blood draw

Utah Supreme Court

In *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), the Utah Supreme Court considered whether the dissipation of alcohol in the bloodstream creates "per se" exigent circumstances justifying a warrantless blood draw under the Fourth Amendment. Addressing the State's contention that there is a recognized general exigency which applies to warrantless blood draws because of the destruction of evidence, the Court stated:

> Had the United States Supreme Court held that the Fourth Amendment permits police to conduct a warrantless blood draw whenever evidence of alcohol is present, the task before us would be easy. However, the fact that it has not so held places us in the position of following a course that is part divination and part pragmatism. We engage in divination when, employing what we might ambitiously call a principled approach to prophecy, we attempt to predict how the United States Supreme Court might decide the question before us. This is a perilous

> activity. As we will see when we take up the clearest pronouncement of the Supreme Court on the issue of alcohol and warrants, the Supreme Court could have created forty years ago the very categorical exigent circumstance rule for alcohol that the State now seeks. But it did not.

Id., at 774.

The Utah Supreme Court proceeded to analyze this Court's decision in *Schmerber,* finding that *Schmerber* requires the combination of three categories of "special facts" to create exigent circumstances. *Rodriguez,* at 776. The three categories of *Schmerber* "special facts" were identified by the Court as: (1) blood-alcohol content begins to drop shortly after drinking ends; (2) time had been taken to transport the defendant to a hospital and to investigate the accident scene; and (3) the necessity to seek out a magistrate and secure a warrant would require even more time. *Id.* The Court stated:

> Contrary to the assertion of the State, *Schmerber* does not stand for the proposition that the loss of evidence of a person's blood alcohol level through the dissipation of alcohol from the body was a sufficient exigency to justify a warrantless blood draw. Rather, these three categories of "special facts" combined to create the exigency. The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself.

Id., at 776.

To support its conclusion that the dissipation of alcohol in the bloodstream, without more, does not create exigent circumstances justifying a warrantless blood draw, the Court highlighted the following language in *Schmerber*: "that we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*, (quoting *Schmerber*, 384 U.S. at 772). The Court concluded that this "guarded language employed by Justice Brennan to define the Court's holding in *Schmerber* reinforces our conclusion that the Court did not intend a categorical recognition of blood-alcohol exigency." *Rodriguez*, at 776.

Ultimately, the Utah Supreme Court held that the warrantless blood draw in *Rodriguez* was reasonable under the "totality of the circumstances" because a serious accident resulting in a fatality had occurred. *Id.,* at 781. Although the Court was sharply critical of the police officers for not considering the possibility of obtaining a search warrant, the Court concluded the warrantless blood draw was reasonable under the "totality of the circumstances" because the passenger in the defendant's vehicle was expected to die. *Id.* "One fact dominates all others with respect to its relevance to whether the warrantless blood draw was reasonable: that [victim] was expected to succumb to her injuries." *Id.* The Court found that this fact "significantly altered the warrant acquisition calculus."

Id. The Court concluded that the "severity of the possible alcohol-related offense bears directly on the presence or absence of an exigency sufficient to justify a blood draw without a warrant." *Id.*

The Utah Supreme Court recognized that its interpretation of *Schmerber* was squarely at odds with the decision of the Wisconsin Supreme Court in *State v. Bohling, supra.* The Utah Supreme Court expressly disavowed the reasoning of the Wisconsin Supreme Court, asserting that its conclusion rested on "a flawed reading of *Schmerber*, and a misapplication of *Skinner." Rodriguez,* at 777.

Iowa Supreme Court

In *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008), the Iowa Supreme Court considered whether, and under what circumstances, the natural dissipation of alcohol in the bloodstream creates exigent circumstances justifying a warrantless blood draw. In its analysis, the Iowa Supreme Court noted that *Schmerber* has been discussed by cases from other jurisdictions with mixed conclusions. *Id.*, at 343. The Court proceeded to analyze and compare the interpretations of *Schmerber* by both the Wisconsin Supreme Court in *State v. Bohling, supra*, and the Utah Supreme Court in *State v. Rodriguez, supra*. *Johnson,* at 343-344. After comparing the two interpretations, the Iowa Supreme Court endorsed the Utah Supreme

Court's view in *Rodriguez,* agreeing that three separate categories of "special facts" must be combined to create the exigency. *Johnson*, at 344.

To support this interpretation, the Iowa Supreme Court placed emphasis on the following language in *Schmerber*: "[i]t bears repeating, however, that we reach this judgment only on the facts of the present record." *Id.,* at 344 (quoting *Schmerber,* 384 U.S. at 772). The Iowa Supreme Court maintained that the "present record" referred to in *Schmerber* showed that time had to be taken by the arresting officer to investigate the scene of the accident, to attend to injuries, and to process the defendant. *Johnson,* at 344. The Court concluded that "there was more underlying the seizure of blood in *Schmerber* than the mere phenomenon of alcohol dissipation." *Id.*

Ultimately, the Court held that the warrantless blood draw was justifiable because the facts of the case were sufficiently similar to the facts in *Schmerber*. *Id.* The Court relied on the fact that the defendant in *Johnson* was involved in an accident resulting in injuries to another person, the defendant attempted to leave the scene on foot, and the blood test was not administered until approximately two and a half hours after the accident. *Id.,* at 344. The Court was therefore satisfied that "time-based considerations similar to those in *Schmerber*" were present. *Id.*

C. The decision of the Missouri Supreme Court has deepened the division among state courts of last resort

The Missouri Supreme Court has adopted a narrow interpretation of *Schmerber*, following the reasoning of the Utah Supreme Court in *Rodriguez, supra*, and the Iowa Supreme Court in *Johnson, supra*. This has created a further division among state courts of last resort.[10] This emerging conflict on a fundamental Fourth Amendment issue will likely continue to divide both state and federal courts until this Court clarifies the holding in *Schmerber*. The intervention of this Court is imperative in order to facilitate uniform application of the Fourth Amendment.

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[10] The Missouri Supreme Court also asserted that its holding was consistent with the Ninth Circuit in *United States v. Chapel,* 55 F.3d 1416 (9th Cir. 1995). App., *infra*, 13a-14a. However, it appears to be at least somewhat unclear whether the Ninth Circuit would require a showing of additional "special facts" before allowing a warrantless blood draw. The Ninth Circuit simply held that there are three *Schmerber* requirements that must be met before a law enforcement officer may take a warrantless blood test: (1) the officer must have probable cause to believe the suspect has committed an offense of which the current state of one's blood will constitute evidence; (2) the officer must reasonably believe an emergency exists in which the delay necessary to obtain a warrant would threaten the loss or destruction of evidence; and (3) the procedures used to extract the sample must be reasonable and in accord with accepted medical practices. *Id.,* at 1419.

To illustrate the point, if a drunk driver traveling on an interstate highway were to be pulled over in the state of Wisconsin or Minnesota, law enforcement authorities would be permitted to obtain a warrantless blood test based upon their high courts' respective interpretations of this Court's decision in *Schmerber*. However, if this same drunk driver were able to cross the state line into Iowa before being pulled over, law enforcement authorities would be precluded from ordering a warrantless blood test based upon the Iowa Supreme Court's interpretation of *Schmerber.* This glaring conflict will not be reconciled until this Court takes action to clarify the holding in *Schmerber*.

II. The Missouri Supreme Court Misinterpreted This Court's Decision In *Schmerber v. California,* 384 U.S. 757 (1966) And Improperly Applied The Fourth Amendment

A. The Missouri Supreme Court misinterpreted *Schmerber*

The Missouri Supreme Court interpreted *Schmerber* to require additional exigency, beyond the natural dissipation of alcohol in the bloodstream, in order to justify a warrantless blood draw. To support this narrow reading, the Court relied extensively on language in *Schmerber* that it understood to be an explicit warning against expansive interpretations:

> It bears repeating, however, that we reach this judgment only on the facts of the present

> record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber, 384 U.S. at 772. App., *infra,* 18a-19a. The Missouri Supreme Court's reliance on what it understood to be an "explicit warning against expansive interpretations," however, is misplaced. This "explicit warning" was directed at the nature of the bodily intrusion itself, not on the underlying facts of the drunk-driving arrest. In the paragraph immediately preceding this "explicit warning," *Schmerber* emphasized that the intrusion at issue, the simple blood test, was performed in a reasonable manner. *Schmerber*, 384 U.S. at 771-772. Noting that the blood sample was taken by a physician in a hospital environment according to accepted medical practices, *Schmerber* proceeded to warn against procedures which might not be safe:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an

> unjustified element of personal risk of infection or pain.

Id. Schmerber thus made it clear that blood tests performed by unqualified personnel in non-medical settings would not be tolerated. *Schmerber* made it equally clear that other, more invasive, bodily intrusions would likewise not be tolerated.

This Court was confronted with an example of a much more invasive bodily intrusion in *Winston v. Lee*, 470 U.S. 753 (1985). There, this Court held it was unreasonable under the Fourth Amendment to compel a robbery suspect to undergo a surgical operation to recover a bullet that had lodged in his chest. Finding that *Schmerber* provides the appropriate framework of analysis for cases involving surgical intrusions beneath the skin, this Court concluded that compelling a suspect to undergo a surgical procedure to recover a bullet was precisely the sort of example of the "more substantial intrusions" cautioned against in *Schmerber. Winston,* 470 U.S. at 755. In so holding, this Court reiterated that "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Id.,* at 762.

Indeed, this Court has long recognized that a simple blood test is a minor intrusion for constitutional purposes. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), this Court recognized that "[t]he blood test procedure has become routine in our everyday life."

Id., at 436. Holding that there is nothing 'brutal' or 'offensive' in the taking of a blood sample when done under the protective eye of a physician, this Court found that a simple blood test "would not be considered offensive by even the most delicate." *Id.,* at 435-436. Later, in *South Dakota v. Neville*, 459 U.S. 553 (1983), this Court noted that "[t]he simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect, against his will, to accede to the test." *Id.,* at 563. There, this Court plainly stated, "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.,* at 559.

B. It is objectively reasonable for a law enforcement officer to obtain a warrantless blood test from a drunk driver because of the imminent destruction of evidence

It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the

action. *Id.,* at 404. Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation" may make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

This Court has identified several exigencies that may justify a warrantless search, including the hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976), the need to render emergency assistance or protect a person from imminent injury, *Brigham City,* 547 U.S. at 403, and the need to prevent the imminent destruction of evidence, *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011). Indeed, in *King* this Court stated that "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Id.,* at 1853-1854. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant.

There can be no dispute that the level of alcohol in the bloodstream of a drunk driver is highly probative evidence. This Court has recognized that blood tests are exceptionally probative in drunk-driving

prosecutions, finding that they are "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S. at 771. See also *Breithaupt, supra,* 352 U.S. at 439 (noting that blood tests are "a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication."); *Winston, supra,* 470 U.S. at 763 ("Especially given the difficulty of proving drunkenness by other means . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

There can also be no dispute that the level of alcohol in the bloodstream of a drunk driver is subject to destruction by the body's natural, physiological processes. In *Schmerber*, this Court found that that the arresting officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S. at 770. In *Skinner, supra*, this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may

result in the destruction of valuable evidence." *Skinner*, *supra*, 489 U.S. at 623.

Blood alcohol evidence is extraordinarily unique precisely because it is an indisputable fact that alcohol is naturally eliminated from the human body. The exigency involved in quickly securing blood alcohol evidence is even more compelling than other situations where there is a risk of destruction of evidence because the alcohol in a suspect's blood is *certain* to disappear, while other types of evidence may only be very likely to disappear. See *State v. Cocio,* 709 P.2d 1336, 1345 (Ariz. 1985). See also 3 W. LaFave, *Search and Seizure*, § 5.4(b), at 199 (4th ed. 2004) (discussing blood alcohol evidence and noting that "the 'evanescent' character of the evidence is inherent in its nature and does not depend upon any motive of the defendant to destroy it.") As the Oregon Supreme Court recently stated in *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010), the focus of the courts should be on the exigency created by blood alcohol dissipation, not on the speed with which a search warrant could presumably be obtained.

The decision of the Missouri Supreme Court, however, actually *requires* police officers to stand by and allow the best, most probative evidence to be destroyed during a drunk-driving investigation. This is wholly inconsistent with core principles of the Fourth Amendment. Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer has

probable cause to arrest a person for a drunk-driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant. Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

III. The Question Presented Is Of Substantial And Recurring Importance

Drunk driving is a serious problem on public roads and highways throughout the United States. This Court is well aware of the dangers posed by drunk drivers. Summarizing the problem over twenty years ago, this Court stated:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.' For decades, this Court has 'repeatedly lamented the tragedy.' 'The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) [citations omitted].

Proper and consistent application of the Fourth Amendment is essential in order for law enforcement to effectively enforce drunk-driving laws throughout the United States. This Court's resolution of the question presented is critically important to law enforcement efforts to promote public safety by ridding our roads and highways of drunk drivers, efforts which have been constrained by misinterpretation of this Court's decision in *Schmerber* and improper application of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF THE PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

JOHN N. KOESTER, JR.,
Counsel of Record
Assistant Prosecuting Attorney
100 Court Street, Suite 204
Jackson, MO 63755
(573) 243-2430
jnkoester@capecounty.us

358 S.W.3d 65

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Appellant,
v.
Tyler G. McNEELY, Respondent.

No. SC 91850.
Jan. 17, 2012.
Rehearing Denied March 6, 2012.

John N. Koester Jr., Cape Girardeau County Prosecuting Attorney's Office, Cape Girardeau, for State.

Stephen C. Wilson, Wilson & Mann LC, Cape Girardeau, for McNeely.

Stephen D. Bonney, Kansas City, for amicus curiae American Civil Liberties Union of Eastern Missouri and American Civil Liberties Union of Western Missouri.

Talmage E. Newton IV, St. Louis, for amicus curiae Missouri Association of Criminal Defense Lawyers.

James B. Farnsworth, Jefferson City, for amicus curiae Attorney General's Office.

PER CURIAM.

Tyler McNeely (Defendant) refused to consent to an alcohol breath test or a blood test after he was arrested for driving while intoxicated. The arresting patrolman, without seeking a warrant from a judge, ordered a medical professional to draw Defendant's blood. The trial court sustained Defendant's motion to

suppress the results of the blood test as the nonconsensual and warrantless blood draw was a violation of his Fourth Amendment rights.

The issue before the Court in this interlocutory appeal is: Under what "special facts" is a nonconsensual and warrantless blood draw in a DWI case a reasonable search and seizure under the Fourth Amendment?

This Court recognizes the two competing interests involved in answering that question, namely, society's interest in preventing the harms caused by drunken driving and an individual's Fourth Amendment right to be secure in his or her person and to be free of unreasonable searches and seizures.

The United States Supreme Court addressed this issue in the landmark case of *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). There, the Supreme Court provided a limited exception to the warrant requirement for the taking of a blood sample in alcohol-related arrests. *Id.* at 772, 86 S.Ct. 1826. The holding, which was expressly limited to the facts of that case, ultimately rested on certain "special facts" that might have led the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770-71, 86 S.Ct. 1826. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and because time had to be taken

both to investigate the accident scene and transport the defendant to the hospital. *Id.* These events left no time for the officer to seek out a judge to secure a search warrant. *Id. Schmerber* held that these "special facts" permitted a warrantless blood draw. *Id.* at 771, 86 S.Ct. 1826.

The patrolman here, however, was not faced with the "special facts" of *Schmerber.* Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

The judgment of the trial court is affirmed.[1]

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[1] Affirming the trial court's decision granting the motion to suppress does not result in the dismissal of the case against Defendant. Instead, the state may proceed in the prosecution of the DWI charge against Defendant based on other evidence not gathered in violation of the Constitution.

I. Facts

A Missouri state highway patrolman, while performing his patrol, stopped Defendant's truck for speeding at 2:08 a.m. As the patrolman spoke with Defendant during the routine traffic stop, he noticed that Defendant displayed the tell-tale signs of intoxication – bloodshot eyes, slurred speech, and the smell of alcohol on his breath. These observations changed the nature of the patrolman's investigation from a routine traffic stop to a DWI investigation. He asked Defendant to step out of the vehicle and to perform standard field-sobriety tests. Defendant performed the tests poorly, and the patrolman placed Defendant under arrest for driving while intoxicated. After securing Defendant in the patrol car, the patrolman asked him if he would consent to a breath test. Defendant refused.

The patrolman testified that, in his more than 17 years of experience, he had obtained warrants when he needed to test the blood of DWI suspects. This time, however, he was influenced by an article he previously had read, written by a traffic safety resource prosecutor, in "Traffic Safety News." He testified that the article asserted officers no longer needed to obtain a warrant before requiring DWI suspects to submit to nonconsensual blood tests because of recent changes in Missouri's implied consent law.[2] Based on

[2] The article, *Warrantless Blood Draws: Are They Now Authorized in Missouri?,* acknowledged that the former version of section 577.041.1 stated that if a person refused both the

(Continued on following page)

this understanding, the patrolman did not seek a warrant and drove Defendant to the local hospital to test his blood to secure evidence of his intoxication. There, Defendant refused to consent to a blood draw. Over Defendant's refusal, the patrolman directed a phlebotomist to draw Defendant's blood for alcohol testing at 2:33 a.m. The blood sample was analyzed, and the results revealed that Defendant's blood-alcohol content was well above the legal limit.

Defendant moved to suppress the results of the blood test as a violation of his Fourth Amendment rights. The trial court sustained the motion. The State brings this interlocutory appeal.[3]

II. Standard of Review

A trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous. *State v. Sund,* 215 S.W.3d 719, 723 (Mo. banc 2007). This Court defers to the trial court's factual findings and

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breath-analyzer and the blood draw test, then "none shall be given." Section 577.041.1, RSMo Supp.2008. However, that section was amended prior to Defendant's arrest by the deletion of the phrase "and none shall be given." Section 577.041.1, RSMo. Supp.2010. With the removal of that phrase, the prosecutor asserted that police officers now may "rely on the well settled principle that obtaining blood from an arrestee on probable cause without a warrant and without actual consent does not offend constitutional guarantees." The prosecutor's assertion rests on a fundamental misreading of *Schmerber.*

[3] This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution.

credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id.* Whether conduct violates the Fourth Amendment is a question of law, which is reviewed *de novo. Id.*

III. Analysis

The issue before this Court is whether the natural dissipation of blood-alcohol evidence is alone a sufficient exigency to dispense with the warrant requirement under the Fourth Amendment.

The Fourth Amendment to the United States Constitution ensures "[t]he right of the people to be secure in their person . . . against unreasonable searches and seizures." The United States Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

An exception to the general rule requiring a search warrant is when exigent circumstances are present. *United States v. Cisneros-Gutierrez,* 598 F.3d 997, 1004 (8th Cir.2010). Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. *Id.*

Every Fourth Amendment analysis requires the balancing of two competing interests: (1) the right of the individual to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and (2) society's interest in discovering and eliminating criminal activity. *Schmerber* recognized this essential and inevitable struggle of the Fourth Amendment:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

384 U.S. at 770, 86 S.Ct. 1826 (quoting *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)) (internal citations omitted).

A. Schmerber v. California

Schmerber provides the backdrop to this Court's analysis in the case at hand. In *Schmerber,* the defendant was driving a vehicle that skidded off the

road. *Id.* at 758 n. 2, 86 S.Ct. 1826. He and his passenger were injured and taken to the hospital for treatment. *Id.* At the hospital, the defendant was arrested and, without his consent or a warrant, an officer directed a physician to take a sample of the defendant's blood. *Id.* at 758, 86 S.Ct. 1826. Analysis of the blood sample revealed that the defendant was intoxicated. *Id.* at 759, 86 S.Ct. 1826. The defendant objected to the trial court's receipt of the blood sample evidence, contending that the warrantless blood draw violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.*

The Supreme Court reasoned that drawing an individual's blood for evidentiary purposes is a search that implicates the Fourth Amendment. *Id.* at 769-70, 86 S.Ct. 1826. Ordinarily a search warrant would be required to perform a blood draw when a person does not consent. *Id.* at 770, 86 S.Ct. 1826. The circumstances in *Schmerber,* however, led the Supreme Court to carve out a very limited exception to the warrant requirement for a blood draw in alcohol-related cases. *Id.* at 772, 86 S.Ct. 1826. The limited exception of *Schmerber* ultimately rested on certain "special facts" that might have caused the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770-71, 86 S.Ct. 1826. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and because there was an

accident requiring time to be taken to both transport the defendant to the hospital and to investigate the scene of the accident. *Id.* Given those "special facts" the Supreme Court concluded that the warrantless search was valid incident to the defendant's arrest. *Id.* at 771, 86 S.Ct. 1826. Although *Schmerber* couched its limited exception to the warrant requirement in terms of a search incident to arrest, it has since been read as an application of the exigent circumstances exception to the warrant requirement. *United States v. Berry,* 866 F.2d 887, 891 (6th Cir.1989).

The State urges that *Schmerber* gives officers the broad authority to direct medical professionals to conduct warrantless and nonconsensual blood draws on DWI defendants on mere probable cause of intoxication. The State asserts that the dissipating nature of blood-alcohol evidence alone constitutes a sufficient exigency to dispense with the warrant requirement in alcohol-related cases.

Schmerber, however, requires more than the mere fact that alcohol naturally dissipates in the blood stream. Instead, it requires a showing of "special facts" to provide an exigency to conduct a warrantless bodily intrusion. *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. 1826. The "special facts" present in *Schmerber* included the time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital. *Id.* These "special facts" might have caused the officer to reasonably believe he was faced with an emergency situation in which the

further delay in obtaining a warrant would threaten the destruction of evidence. *Id.* Under this limited fact situation, *Schmerber* held a nonconsensual, warrantless blood draw was permissible under the Fourth Amendment. *Id.* at 772, 86 S.Ct. 1826. This interpretation of *Schmerber* is supported by other jurisdictions that have addressed this issue.

B. Other Jurisdictions That Have Addressed Schmerber *Have Held That "Special Facts" Beyond the Natural Dissipation of Blood-Alcohol Are Required*

Since *Schmerber,* several courts have addressed whether *Schmerber*'s holding allows for nonconsensual, warrantless blood draws in routine DWI cases. The Supreme Court of Utah held that the dissipating nature of blood-alcohol evidence alone is not a *per se* exigency justifying a warrantless search. *State v. Rodriguez,* 156 P.3d 771, 772 (Utah 2007). In *Rodriguez,* the defendant was critically injured in a serious automobile accident and was rushed to the hospital. *Id.* An officer went to the hospital where the defendant was being treated and observed the odor of alcohol on her breath, slurred speech, red eyes, and belligerent behavior. *Id.* Blood was drawn from the defendant through an IV line that the hospital staff had previously inserted in her arm. *Id.* The analysis of her blood revealed that her blood-alcohol level was five times the legal limit in Utah. *Id.* At trial, the defendant moved to suppress the evidence obtained from the warrantless blood draw. *Id.*

Rodriguez, in analyzing *Schmerber,* stated: "The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself." *Id.* at 776. Instead, the Utah court reasoned, *Schmerber*'s exigent circumstances exception to the warrant requirement rested on all of the "special facts" of *Schmerber,* and the natural dissipation of blood-alcohol was only one of those "special facts." *Id. Rodriguez* adopted a totality of the circumstances test for the determination of whether there exists a sufficient exigency justifying a warrantless blood draw. *Id.* at 782. *Rodriguez* reasoned that the seriousness of the accident in the case, coupled with the compelling evidence of the defendant's alcohol impairment, was "sufficient to establish that the interests of law enforcement outweighed, in this instance, [the defendant's] privacy interests." *Id.* at 781. The Supreme Court of Utah held that, given the totality of the circumstances, probable cause and exigent circumstances justified a warrantless blood draw in the case before it. *Id.* at 782.

Similarly, the Supreme Court of Iowa noted that *Schmerber* rejected the notion that the natural dissipation of blood-alcohol constituted a *per se* exigency justifying a warrantless blood draw. *State v. Johnson,* 744 N.W.2d 340, 344 (Iowa 2008). In *Johnson,* the defendant was involved in a car accident that caused serious injury to the driver of another car. *Id.* at 341. After the accident, the defendant fled the scene on foot, but the police tracked him down not far from the scene. *Id.* He was arrested and taken to the police

station, where he refused a breath test. *Id.* Subsequently, he was taken to the hospital, and a blood sample was drawn without a warrant and without his consent. *Id.* Analysis of his blood revealed that his blood-alcohol concentration was well above the legal limit in Iowa. *Id.* The defendant moved to suppress the results of the blood test. *Id.*

Johnson analyzed the admissibility of a warrantless blood draw performed in accordance with an Iowa statute authorizing such draws. *Id.*[4] The defendant argued that the officer was not faced with an "emergency" under the Iowa statute. *Id.* The Iowa court found that there were *Schmerber*-like time-based considerations present in the case before it because the officer had to take time to investigate the scene, track down the fleeing defendant, administer sobriety tests, and transport him to the police station and hospital. *Id.* at 344. Two and a half hours after the accident, officers were finally able to draw the

[4] The Iowa statute in question closely tracked the rationales of *Schmerber,* allowing a nonconsensual, warrantless blood draw when the operator of a motor vehicle is arrested for an "accident that causes a death or personal injury reasonably likely to cause death" when three additional elements are present: (1) the officer reasonably believes the blood drawn will produce evidence of intoxication; (2) the blood is drawn by a medical personnel; and (3) the officer reasonably believes that he or she is confronted with an emergency situation in which the delay necessary to obtain a warrant threatens the destruction of the evidence. *Id.* at 342 (quoting Iowa Code section 321J.9 (2005)).

defendant's blood. *Id. Johnson* held that the warrantless blood draw was permissible because the officer, in investigating a serious injury accident, "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Id.* at 342-43 (quoting *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826). The Supreme Court of Iowa rejected the idea that *Schmerber* created a *per se* exigency based on the nature of blood-alcohol alone. *Id.* at 344. Instead, it noted that "there was more underlying the seizure of blood in *Schmerber* than the mere phenomenon of alcohol dissipation." *Id.*

Finally, the Ninth Circuit held that an arrest is not a constitutional prerequisite to a warrantless blood draw in *United States v. Chapel,* 55 F.3d 1416, 1420 (9th Cir.1995). In so holding, the court discussed the constitutionality of nonconsensual, warrantless blood draws. It reasoned that although a nonconsensual, warrantless blood draw may be based upon probable cause instead of requiring an arrest, *Schmerber* requires more:

> In addition to probable cause, the other *Schmerber* requirements remain in place. The officer must still reasonably believe that an emergency exists in which the delay necessary to obtain a warrant would threaten the loss or destruction of evidence. The procedures used to extract the sample must still

> be reasonable and in accordance with accepted medical practices.

Id. at 1419.

Chapel's interpretation of *Schmerber* is consistent with this Court's holding today. The DWI defendant in *Chapel* had been severely injured in a motorcycle accident; therefore, the officer was faced with an emergency situation that – taken with the natural dissipation of blood-alcohol, the accident investigation, and the hospital transportation time delay – constituted exigent circumstances justifying a nonconsensual, warrantless blood draw. *See id.* at 1417-20.

Contrary to the State's assertion, no case in Missouri supports a *per se* rule that the natural dissipation of blood-alcohol is alone sufficient to constitute exigent circumstances that would permit officers in every DWI case to take blood from a suspect without consent or a search warrant.[5] The State

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[5] The State cites *State v. Ikerman* and *State v. Setter* to support its position that warrantless blood draws are permissible in DWI cases, but both of these cases applied *Schmerber* in terms of a search incident to arrest. *Setter,* 721 S.W.2d 11, 16 (Mo.App.1986); *Ikerman,* 698 S.W.2d 902, 904-05 (Mo.App.1985). The State acknowledges, however, that "[w]hile *Schmerber* casts its decision in terms of the 'search incident to arrest' exception to the warrant requirement, it has since been read as an application of the 'exigent circumstances' exception." Appellant's Substitute Brief at 17; *See also Berry,* 866 F.2d at 891; *Rodriguez,* 156 P.3d at 776; *Johnson,* 744 N.W.2d at 342; *State v. Shriner,* 751 N.W.2d 538, 543 (Minn.2008); *Chapel,* 55 F.3d at

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argues that *State v. LeRette* supports its position. 858 S.W.2d 816 (Mo.App.1993). In *LeRette,* the defendant was the driver of an automobile involved a serious-injury accident. *Id.* at 817. When the officer arrived at the scene, emergency personnel were loading the defendant into an ambulance. *Id.* While investigating the accident, the officer found several beer cans among the wreckage debris, including a half-empty can. *Id.* Later, at the hospital, the officer found the defendant with a tube down his throat and unable to communicate. *Id.* The officer directed a hospital employee to take a blood sample from the defendant for the purpose of determining his blood-alcohol content. *Id. LeRette* justified the warrantless blood draw based on the facts that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence. The court stated that "both prongs of the exigent circumstances exception were established – probable cause that incriminating evidence would be found and exigent circumstances justifying the search." *Id.* at 819. While the court in *LeRette* did not specifically identify the exigent circumstances, it is significant to note that there was some passage in time for the officer to remain at the scene to do investigatory work while

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1418; *State v. Bohling,* 173 Wis.2d 529, 494 N.W.2d 399, 402 (1993). To the extent that *Ikerman* and *Setter* interpret *Schmerber* to allow a nonconsensual warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they are no longer to be followed.

the defendant was taken to the hospital. *See id.* at 817. Further, when the officer later arrived at the hospital, he was confronted with an individual with whom he could not communicate. *Id.* at 817.

The factual circumstances in *LeRette* are significantly different from the case here, as notably *LeRette* involved an accident that required investigation and a further time delay when the driver was taken to a hospital for treatment, unlike the routine DWI stop in this case. *LeRette* embodied a straight forward application of the "special facts" of emergency contemplated by *Schmerber,* in that the DWI suspect in *LeRette* – just as the defendant was in *Schmerber* – was involved in a serious-injury accident that caused a time delay in both the investigation of the accident and the transportation of the defendant to the hospital. *Id.* at 819.[6]

C. This Court Disagrees with Jurisdictions That Have Adopted a Per Se *Exigency Analysis*

In contrast to the forgoing, Wisconsin, Oregon, and Minnesota have adopted the rationale that the rapid dissipation of alcohol alone constitutes a sufficient exigency to draw blood without a warrant. *State*

[6] To the extent that *LeRette* could be read as permitting a warrantless blood draw based on the mere fact that alcohol diminishes in the blood stream over time, it is no longer to be followed.

v. Bohling, 173 Wis.2d 529, 494 N.W.2d 399, 406 (1993); *State v. Machuca,* 347 Or. 644, 227 P.3d 729, 736 (2010); *State v. Netland,* 762 N.W.2d 202, 212-13 (Minn.2009). In a 4-3 decision, the Supreme Court of Wisconsin stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, 494 N.W.2d at 402. The Wisconsin court believed that that the more reasonable interpretation of *Schmerber* was the former. *Id.* It reasoned that the exigency in *Schmerber* was caused "solely" by the fact that alcohol dissipates in a person's blood stream over time. *Id. Bohling* held that a warrantless blood draw is permitted when a person is lawfully arrested for a drunken-driving related crime and there is a clear indication that the evidence obtained will produce evidence of intoxication. *Id.* at 406.[7]

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[7] In a subsequent 4-3 decision, the Supreme Court of Wisconsin extended its holding in *Bohling* to permit nonconsensual, warrantless blood draws even when the defendant has

(Continued on following page)

Similarly, the Supreme Court of Oregon held that the natural dissipation of a defendant's blood-alcohol is an exigent circumstance that will "ordinarily permit a warrantless blood draw." *Machuca,* 227 P.3d at 736 (relying on its prior interpretation of *Schmerber* in *State v. Milligan,* which stated "the evanescent nature of the evidence sought . . . constitutionally justifies [a warrantless blood draw]." 304 Or. 659, 748 P.2d 130, 136 (1988)).

Finally, a divided Supreme Court of Minnesota held that the natural dissipation of alcohol in the blood creates "single-factor exigent circumstances" that justify a warrantless, nonconsensual blood draw. *Netland,* 762 N.W.2d at 212-213 (citing *State v. Shriner,* 751 N.W.2d 538, 549-50 (Minn.2008)). *Shriner* interpreted the *Schmerber* exigency to rest only on the fact that the "percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Shriner,* 751 N.W.2d at 545 (quoting *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826; internal quotation marks omitted).

This Court cannot agree with these interpretations of *Schmerber.* In *Schmerber,* the Supreme Court rejected a *per se* exigency and explicitly warned against such expansive interpretations:

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consented and submitted to a breath test. *State v. Faust,* 274 Wis.2d 183, 682 N.W.2d 371, 379 (2004).

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits . . . intrusions under other conditions.

Schmerber, 384 U.S. at 772, 86 S.Ct. 1826. *Schmerber* requires some exigency beyond the mere natural dissipation of blood-alcohol evidence. It explicitly found that the time delay that resulted from both the investigation of the accident and the transportation of the defendant to the hospital were "special facts" that authorized a warrantless blood draw under the Fourth Amendment. *Id.* at 770-71, 86 S.Ct. 1826. To allow a warrantless blood draw in the absence of such "special facts" would be to ignore the Supreme Court's statement in *Schmerber* that the Constitution in no way permits warrantless blood draws "under other conditions." *Id.* at 772, 86 S.Ct. 1826.

IV. Conclusion

Schmerber reaffirms that warrantless intrusions of the body are not to be undertaken lightly and that exigency is to be determined by the unique facts and circumstances of each case. *Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits

a nonconsensual, warrantless blood draw. It requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case. *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. 1826. Officers must reasonably believe that they are confronted with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770, 86 S.Ct. 1826. The question of whether an emergency exists sufficient to trigger the exigent circumstances exception to the warrant requirement heavily depends on the existence of "special facts" and must be determined on a case-by-case basis. In routine DWI cases, in which no "special facts" exist other than the natural dissipation alcohol in the blood, a warrant must be obtained before such evidence is gathered. This requirement ensures that the inferences to support the blood draw be made by a neutral and detached judge "instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson,* 333 U.S. at 13-14, 68 S.Ct. 367. The warrant requirement is especially important when the issue is "whether or not to invade another's body in search of evidence of guilt." *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826.

Defendant's case is unquestionably a routine DWI case. Although his body was working naturally to expunge the alcohol in his system, there were no other "special facts" of exigency in his case. There was no accident to investigate and no injuries to attend to that required the patrolman to expend time, delaying

his request of Defendant to submit to blood-alcohol testing. The patrolman could not identify any exigent circumstances and made no attempt to obtain a search warrant. The nonconsensual, warrantless blood draw was taken only 25 minutes after Defendant was stopped. Time-based considerations similar to those in *Schmerber* were not present here.[8] There were no "special facts" in this case, other than the natural dissipation of blood-alcohol, that indicated the arresting patrolman was faced with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence. He was not justified, therefore, in failing to seek a warrant before drawing Defendant's blood over his refusal to consent.[9]

Defendant's Fourth Amendment right to be free from unreasonable searches of his person was violated, and the trial court's judgment sustaining Defendant's motion to suppress is affirmed. The State may go forward in the prosecution of the DWI charge against Defendant based on evidence gathered in

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[8] For example, in *Johnson,* more than two and a half hours had passed between the accident and the warrantless blood draw. *Johnson,* 744 N.W.2d at 344. In *Schmerber,* the exact time that had elapsed was not reflected in the opinion, but the investigation of the accident and the transportation of the defendant to the hospital caused a time delay. *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. 1826.

[9] Because the warrantless blood draw in this case was a violation of Defendant's Fourth Amendment right to be free from unreasonable searches, there is no need to address the State's arguments based on Missouri's implied consent law.

conformity with the Constitution. The case is remanded.

TEITELMAN, C.J., RUSSELL, BRECKENRIDGE, FISCHER, STITH, and PRICE, JJ., and ASEL, Sp.J. concur.

DRAPER, J. not participating.

2011 WL 2455571

Missouri Court of Appeals,
Eastern District,
Division Four.
STATE of Missouri, Appellant,
v.
Tyler G. McNEELY, Respondent.

No. ED 96402.
June 21, 2011.
Transferred to 2012 WL 135417.

Appeal from the Circuit Court of Cape Girardeau County, Benjamin F. Lewis, Judge. John N. Koester, Prosecuting Atty. For Cape Girardeau County, Jackson, MO, for appellant.

Stephen C. Wilson, Cape Girardeau, MO, for respondent.

ROBERT G. DOWD, JR., Judge.

The State of Missouri appeals from the trial court's grant of Tyler G. McNeely's ("Defendant") motion to suppress evidence. Defendant was charged with driving while intoxicated, Section 577.010, RSMo 2000.[1] In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant's person after he was arrested for driving while intoxicated because the sample was taken without Defendant's consent and

[1] All further statutory references are to RSMo 2000, unless otherwise indicated.

without a search warrant. We would reverse; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

On October 3, 2010, Corporal Mark Winder ("Corporal Winder") observed Defendant driving above the posted speed limit. As he was following Defendant before he pulled him over, Corporal Winder observed Defendant crossing the center line of the road three times. When he made contact with Defendant, he detected "a strong odor of intoxicants on his breath and his eyes were glassy and bloodshot." Defendant stated he had a couple of beers, and when Corporal Winder asked him to step out of the vehicle, he was unstable on his feet and swayed while maintaining his balance.

Corporal Winder administered four field sobriety tests on Defendant, and Defendant performed poorly on each of them. Defendant refused to give a breath sample into a portable breath tester and was subsequently placed under arrest for driving while intoxicated.

Corporal Winder began to transport Defendant to the Cape Girardeau County Jail to administer a breath test, but Defendant stated he would refuse to take a breath test. Thus, Corporal Winder transported Defendant to the St. Francis Medical Center Lab to obtain a blood sample.

Corporal Winder read Defendant the Missouri Implied Consent and asked that he provide a blood sample. Defendant refused. Corporal Winder informed Defendant that, pursuant to Missouri law, he was going to obtain the blood sample against his refusal. At that point, a lab technician withdrew a blood sample from Defendant. The sample showed Defendant's blood-alcohol level was 0.154 percent. Corporal Winder immediately took possession of the sample and transported Defendant to the Cape Girardeau County Jail. After arriving at the jail, Corporal Winder again read Defendant the Missouri Implied Consent and asked that he submit to a breath test, but Defendant again refused.

The State filed charges against Defendant for driving while intoxicated. Defendant subsequently filed a motion to suppress the blood sample taken from Defendant because it was taken from Defendant without his consent and without a warrant.

In ruling on the motion, the trial court found this case did not involve exigent circumstances and, relying on *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), it found the Fourth Amendment requires either a warrant or exigent circumstances to withdraw blood without consent. The trial court noted that the holding in *Schmerber,* where the results of the blood test were found to be admissible, was limited to the "special facts" of that case, which included a delay of two hours while the officer investigated the scene of an accident before delivering the defendant to the hospital and the court's specific

finding that there was no time to seek out a magistrate and secure a warrant. As a result, the trial court granted Defendant's motion to suppress evidence obtained by the warrantless blood withdrawal in this case where there was no accident and no substantial delay between the traffic stop and the blood draw and both a prosecutor and judge were readily available to issue a search warrant. The State appeals the suppression of the evidence.

In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated because the legislature eliminated the "none shall be given" language from Section 577.041, and that was the only provision under Missouri law barring police officers from obtaining nonconsensual and warrantless blood samples. We agree.

Our review of a trial court's ruling on a motion to suppress is limited to a determination of sufficiency of the evidence to sustain the trial court's finding. *State v. Kriley,* 976 S.W.2d 16, 19 (Mo.App. W.D.1998). At the hearing on the motion, the State has the burden of going forward with the evidence and the risk of non-persuasion to show by a preponderance of the evidence that a motion to suppress should be overruled. Section 542.296.6; *State v. Cook,* 273 S.W.3d 562, 567 (Mo.App. E.D.2008). The burden is placed upon the State because warrantless searches are presumptively unreasonable. *State v. Weddle,* 18 S.W.3d

389, 396 (Mo.App. E.D.2000). We will affirm the judgment of the trial court if there is sufficient evidence which would support the trial court's decision to sustain the motion to suppress on any ground alleged in the defendant's motion. *Kriley,* 976 S.W.2d at 19. We will only reverse the trial court's judgment if it is clearly erroneous. *Id.* The trial court's judgment is clearly erroneous if we are left with the definite and firm belief that a mistake has been made. *Id.*

In reviewing the trial court's decision to grant a motion to suppress, we view the evidence presented and all reasonable inferences drawn therefrom in the light most favorable to the trial court's order and disregard all evidence and inferences to the contrary. *State v. Abeln,* 136 S.W.3d 803, 808 (Mo.App. W.D.2004). We defer to the trial court's factual findings, and we review *de novo* whether the Fourth Amendment was violated as a matter of law under the facts found by the trial court. *Id.*

The Fourth Amendment to the United States Constitution guarantees that citizens will not be subject to unreasonable searches or seizures. U.S. Const. Amend. IV; *Simmons v. State,* 247 S.W.3d 86, 90 (Mo.App. S.D.2008). A search conducted without a warrant is presumptively unreasonable. *Id.* An exception to the general rule that a search requires a warrant exists when exigent circumstances are present. *Id.* Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. *Id.* The overriding function of the Fourth Amendment is to

protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber,* 384 U.S. at 767, 86 S.Ct. 1826.

Here, we are dealing with questions of law and, thus, our review is *de novo.* The State contends we are confronted with a two-prong inquiry here: (1) is a nonconsensual and warrantless blood draw under these circumstances a reasonable search and seizure under the Fourth Amendment; and (2) if so, does the Missouri implied consent law prohibit such nonconsensual and warrantless tests? We will begin with the first question.

The watershed case in this area of law is *Schmerber.* In *Schmerber,* the defendant was convicted of driving an automobile while under the influence of intoxicating liquor. *Schmerber,* 384 U.S. at 758, 86 S.Ct. 1826. The defendant had been arrested for driving while intoxicated at a hospital while receiving treatment for injuries suffered in an accident involving the car he had been driving. *Id.* At the direction of a police officer, a blood sample was taken from the defendant by a doctor at the hospital, and this sample showed he was intoxicated. *Id.* at 758-59, 86 S.Ct. 1826. The report of this analysis was admitted at trial, even though the defendant objected because the blood had been drawn despite his refusal. *Id.* In affirming the admission of the blood sample at trial, the Supreme Court noted the officer might have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant threatened the destruction of evidence under

the circumstances because the percentage of alcohol in the blood diminishes as the body functions to eliminate it from the system. *Id.* at 770-71, 86 S.Ct. 1826. The Supreme Court noted "special facts" of this case included the fact that "time had to be taken to bring the accused to the hospital and to investigate the scene of an accident, [and] there was no time to seek out a magistrate and secure a warrant." *Id.* The Supreme Court found the defendant's rights under the Fourth Amendment had not been violated. *Id.* at 772, 86 S.Ct. 1826.

While the Court in *Schmerber* ostensibly relied on the "search incident to arrest" exception to the warrant requirement, subsequent courts have found it can be read as an application of the exigent circumstances exception to the warrant requirement. *U.S. v. Berry,* 866 F.2d 887, 891 (6th Cir.1989). The court in *Berry* noted because "evidence of intoxication begins to dissipate promptly, it is evident in this case that there were exigent circumstances indicating the need to take such action." *Id.* While *Berry* involved a warrantless blood draw at the hospital some time after a one car accident and the defendant was unconscious and unable to give consent, the court did not justify its ruling that the blood draw occurred under exigent circumstances with any "special facts." *Id.* The court merely stated "[t]he officer had ample cause to believe that defendant was under the influence of alcohol. The method of testing was safe and reasonable and administered by qualified personnel. It was done only

after there was a reasonable basis to effect this 'search and seizure.'" *Id.* at 890.

In *State v. Faust* 274 Wis.2d 183, 682 N.W.2d 371, 373 (2004), the Supreme Court of Wisconsin found "the rapid dissipation of alcohol in the bloodstream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless[,] nonconsensual test of that individual's blood." In that case, the court went even further by saying a warrantless, nonconsensual blood test was permissible because the presumptively valid chemical sample of the driver's breath that the police already had did not extinguish the exigent circumstances justifying the warrantless, nonconsensual blood draw. *Id.* The facts of that case involved a routine traffic stop, executed because the license plates were not registered to the vehicle. *Id.* at 374. Upon approaching the vehicle, the officer smelled a strong odor of intoxicants and observed the driver slurring his speech. *Id.* The officer then administered a field sobriety test that the driver failed. *Id.* The driver then volunteered to submit to a preliminary breath test, which indicated his blood alcohol concentration was above the legal limit. *Faust,* 682 N.W.2d at 374. The driver was then placed under arrest and taken to police headquarters where he performed another breath test, indicating his blood alcohol content was above the legal limit. *Id.* The officer then requested that the driver submit to a blood test, but the driver refused, at which point the officer transported him to a hospital and had a phlebotomist administer a blood

test without ever seeking a warrant. *Id.* The results of the blood test were admitted into evidence and showed the driver had a blood alcohol content above the legal limit. *Id.* The court in Faust also rejected an argument that Defendant puts forth in this case, that is, that *Schmerber* should be narrowly interpreted and its holding limited to cases with "special facts," finding instead that "exigent circumstances exist based solely on the fact that alcohol rapidly dissipates in the bloodstream." *Id.* at 377.

Missouri courts have recognized and adopted the holding in *Schmerber.* In *State v. Ikerman,* 698 S.W.2d 902, 904-05 (Mo.App. E.D.1985), the court noted *Schmerber* supports the general principle that the warrantless extraction of a blood sample without consent but incident to a lawful arrest is not an unconstitutional search and seizure and that the results of a blood test performed thereon are admissible in evidence. Thus, the implied consent statute authorizing a "search," that is, the extraction of blood for a blood alcohol test, without a warrant or actual consent does not offend the constitutional guarantees of due process or of freedom from unreasonable search and seizure of one who has first been arrested. *Id.*

Further, in *State v. Lerette,* 858 S.W.2d 816, 819 (Mo.App. W.D.1993), a trooper arrived at the scene of a one car accident and spoke with the passenger in the vehicle who smelled of intoxicants and who indicated that the defendant had been driving the car at the time of the accident. The trooper also found several beer cans strewn among the wreckage debris

including a partially full beer can in a Budweiser "coolie" holder next to the wrecked vehicle. *Id.* The accident involved a single vehicle driven by the defendant that for no apparent reason ran 30 feet off the roadway, rolling and flipping over and resulting in serious injuries to the defendant. *Id.* The court found that considering that the trooper was aware of all of this evidence after he arrived at the scene, he had ample cause to believe that the defendant was under the influence of alcohol while he was driving his car at the time of the accident. *Id.* The court found these facts establish that the trooper had probable cause to believe that incriminating evidence would be found if the defendant's blood were tested. *Id.* When the trooper arrived at the hospital, the trooper could not tell if the defendant was conscious or not, but he could not communicate with him and therefore, could not obtain his consent to a blood test. *Id.* The trooper directed hospital personnel to conduct a blood test anyway, and the results of the blood test were later suppressed by the trial court on the defendant's motion. *Id.* That order was reversed, and the court noted

> considering that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence, this court finds that there were exigent circumstances warranting [the trooper's] actions and, as such, it would have been unreasonable to require him to take the time to obtain a search warrant.

Id.

In *Faust*, *Berry,* and *Lerette,* where the courts followed *Schmerber* in applying the exigent circumstances exception to the warrant requirement, the courts did not require any "special facts" to justify the application of the exigent circumstances exception. Instead, they merely rely on the evanescence of blood alcohol concentrations as creating exigent circumstances such that no warrant is needed to conduct a search. We note both *Berry* and *Lerette* involved defendants who were unconscious or unable to give consent, but with respect to getting consent while evidence of alcohol is metabolized, an inability to give consent is effectively the same as a refusal of consent; the police are forced to either get a warrant or justify a blood test under exigent circumstances. We have no reason to require "special facts" in addition to the facts that the officer had ample cause to reasonably believe defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

We also note that while we are dealing with an intrusion into a person's body to obtain their blood, the Court in *Schmerber* noted extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. *Schmerber,* 384 U.S. at 771, 86 S.Ct. 1826. Further, writing over forty years ago, the Court noted "such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood

extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.*

Thus, we find Defendant's Fourth Amendment rights were not violated by the warrantless blood draw in this case.

We now turn to the question of whether the Missouri implied consent law prohibits such nonconsensual and warrantless tests. To further attempt to rid the highways of drunk drivers, our legislature enacted, like many other states, an "implied consent" statute. The theory behind this law is that the use of public streets and highways is a privilege and not a right, and that a motorist, by applying for and accepting an operator's license, "impliedly consents" to submission to a chemical analysis of his blood alcohol level when charged with driving while intoxicated. *Gooch v. Spradling,* 523 S.W.2d 861, 865 (Mo.App. W.D.1975). Section 577.020, Cum.Supp.2009, the implied consent statute, states in pertinent part:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood pursuant to the following circumstances:
>
> (1) If the person is arrested for any offense arising out of acts which the arresting officer

> had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition; . . .
>
> 3
>
> The test shall be administered at the direction of the law enforcement officer whenever the person has been arrested or stopped for any reason.

Along with the implied consent statute, the legislature enacted a "refusal" statute, Section 577.041, RSMo Cum.Supp.2010 which currently provides, in relevant part:

> If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMo, or section 577.010 or 577.012.

Previously, this provision provided:

> If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then *none shall be given and* evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or

> 565.082, RSMo, or section 577.010 or 577.012.

Section 577.041.1 Cum.Supp.2009. (emphasis added).

The previous version of Section 577.041 has been interpreted in *State v. Trumble,* 844 S.W.2d 22, 24 (Mo.App. W.D.1992), where the court noted the statute meant a motorist "has the present, real option either to consent to the test or refuse it." The court further found the statute provided that if one chooses not to comply with the arresting officer's request, by refusing to take a chemical test, then evidence of that refusal may be admissible in a proceeding against the motorist and further that the motorist's license may be subject to revocation. *Id.* The court also noted Section 577.041 provided the statutory requirements which must be satisfied in order to admit an arrestee's refusal into evidence, and, as a result, that section was more consistently read as providing a resource for the state in the prosecution of drunk driving cases rather than creating a "right" for an arrested motorist to refuse the test. *Id.*

However, no Missouri case has dealt directly with the import of the removal of the words "none shall be given" from Section 577.041. In *State v. Smith,* 134 S.W.3d 35, 36-37 (Mo.App. E.D.2003), after arresting a driver for driving while intoxicated, an officer obtained a search warrant to draw blood after the driver refused to submit to a chemical test. The court in that case interpreted the "none shall be given" language of Section 577.041 and concluded that the

provisions of Section 577.041 do not prohibit the admission of chemical test results obtained by warrant from a person arrested for driving while intoxicated who has refused a police officer's request to submit to a test. *Id.* at 38. The court noted the command that "none shall be given" was addressed only to the authority of law enforcement officers to proceed with a warrantless test under Chapter 577. *Id.* at 40.

Thus, the court in *Smith* found the "none shall be given" language prevented law enforcement officers from obtaining nonconsensual blood draws without a court-issued warrant. Subsequent to that holding, the legislature amended Section 577.041 to remove the words "none shall be given" from the statute. Thus, we are presented with the question of whether law enforcement officers are now permitted to obtain warrantless, nonconsensual blood draws when they have reasonable suspicion that a person is driving while intoxicated. We note the legislature is presumed to know the state of the law when it enacts a statute. *State v. Prince,* 311 S.W.3d 327, 334 (Mo.App. W.D.2010). Further, the legislature is presumed to intend what the statute says, and we give effect to the words based on their plain and ordinary meaning. *Id.* at 334-35. In light of our analysis above, we would conclude because of the recent revision of Section 577.041, removing the words "none shall be given," law enforcement officers are now permitted to order a warrantless blood draws when they have reasonable suspicion that a person is driving while intoxicated. However, no Missouri case has yet addressed the

import of the removal of the words "none shall be given" from Section 577.041.

We would find the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated. However, in the light of the fact that no Missouri case has yet addressed the import of the removal of the words "none shall be given" from Section 577.041, which we believe involves a significant departure from current case law as represented by the *Smith* case, and the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

KURT S. ODENWALD, P.J. and GARY P. KRAMER, Sp.J., concur.

IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI DIVISION II

STATE OF MISSOURI, PLAINTIFF,	)	
VS.	)	**CASE NO. 10CG-CR01849-01**
TYLER G. MCNEELY, DEFENDANT.	)	

ORDER AND JUDGMENT ON DEFENDANT'S MOTION TO SUPPRESS

The Defendant moved to suppress the results of a blood test taken without his consent and without a search warrant. Evidence on the motion was adduced on January 14, 2011 and the matter was taken under advisement pending receipt of briefs. Now, on the third day of March, 2011, the Court makes the following findings of fact, conclusions of law and judgment.

THE FACTS

Corporal Mark Winder was on patrol in Cape Girardeau County at 2:08 A.M. on Sunday, October 3, 2010. He was northbound on Kingshighway in the City of Cape Girardeau when his radar indicated that the Defendant's vehicle was speeding. Winder made a U-turn and stopped the Defendant, Tyler G. McNeely.

Winder observed that the Defendant showed signs of intoxication, which he confirmed with field sobriety tests. The Defendant declined to submit to a

test with a portable breath testing device. Winder arrested the Defendant and placed him in his patrol car at 2:18 A.M..

While en route to the Highway Patrol office at the Cape Girardeau County Sheriff's office in Jackson, Winder asked the Defendant if he would submit to a breath test at the sheriff's office. The Defendant said that he would not.

St. Francis Medical Center in Cape Girardeau was nearby and Corporal Winder drove there. Winder read the implied consent form to the Defendant. The Defendant said that he would not consent to a blood test for alcohol. Winder noted the time of the refusal as 2:33 A.M on the implied consent form. Winder directed the lab technician to draw the Defendant's blood and a sample was taken.

The Defendant was transported to the jail where he was again read the implied consent law and refused to take a breath test. Winder noted the second refusal at 2:55 A.M. No effort was made at any time to obtain a search warrant to procure the blood sample. Winder testified that he had been instructed that due to changes in the law, a warrant was not necessary to obtain the Defendant's blood sample.

Winder testified that he was sure that there was a prosecutor on call when he stopped the Defendant. He testified that the Cape Girardeau County Prosecutor has prepared an affidavit form for officers to use for a search warrant for blood of DWI suspects. He testified that he had obtained search warrants in

these circumstances less than ten times but he was never unable to obtain a warrant due to the unavailability of a prosecutor or a judge. Further, Winder testified that there was no reason to believe that he could not have obtained a search warrant due to the unavailability of a prosecutor or a judge. The Court received evidence of six cases in which search warrants for blood were obtained in Cape Girardeau County after regular business hours.

Sergeant Blaine Adams of the Missouri Highway Patrol testified that the Highway Patrol issued a communication instructing that warrantless searches for blood were only to be used in exigent circumstances and then only in driving while intoxicated cases that resulted in death or serious injury. Further, the patrol had instructed that warrantless searches were to be conducted only after expending all reasonable means to obtain a search warrant. The communication further recommended that zone sergeants (like Adams) meet with local prosecutors to discuss the procedure for when warrantless searches would be appropriate. This communication relied in part on the amendment (effective prior to the Defendant's arrest) of §577.041 RSMo. to delete the words "then none shall be given" from the implied consent law.

Sergeant Adams testified that he met with the Cape Girardeau County Prosecuting Attorney whose advice was the opposite of the Highway Patrol interoffice communication. According to Adams, the prosecutor instructed him that, "[I]f it's a standard DWI arrest or if it's a motor vehicle accident with no

injuries and they refuse, to go ahead and draw their blood. [The Prosecutor] said if it was a vehicle accident with injuries, he would prefer to get a search warrant . . . "

As to the exigency of the circumstances of a DWI arrest, Sergeant Adams was of the opinion that "any DWI arrest is exigent circumstances because you have evidence being destroyed with every passing minute."

Sergeant Adams agreed that the Highway Patrol communication recommended warrantless searches only in exigent circumstances where there was a manslaughter or vehicular assault with serious injuries. He also agreed that the Prosecuting Attorney's instructions were the opposite: that warrantless searches were appropriate for run of the mill DWI's but in a serious case the troopers should apply for a warrant. Sergeant Adams agreed that the Defendant's case was exactly a run of the mill case.

CONCLUSIONS OF LAW

In *Schmerber v. California, 384 U.S. 757 (1966),* the United States Supreme Court affirmed the defendant's conviction for driving while intoxicated. Schmerber had challenged the State's warrantless withdrawal of a blood sample following his arrest. The court found that the blood draw did not violate Schmerber's Fourth Amendment rights because it was a search incident to his arrest. However, the court also found that this was an emergency situation

because there was a delay of about two hours for the officer to investigate the scene of the accident and for the defendant to be delivered to the hospital and that the evidence of alcohol in his blood was being diminished by normal bodily function. The court specifically found that "there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." *Schmerber at 771.*

The facts before this court are substantially different that the facts in *Schmerber.* There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established the exigent circumstances, did not exist in this case to justify the warrantless search.

The next question is whether, as Corporal Winder believed, amendment of §577.041 RSMo. made it unnecessary to obtain a search warrant. The statute was amended in 2010, well after the Court of Appeals

issued its opinion in *State v. Smith, 134 S. W.3d 35 (Mo.App., E.D., 2004).*

In *Smith,* the defendant was arrested for driving while intoxicated, refused the breath test and was then subjected to a blood test pursuant to a search warrant. The trial court held that the implied consent law prohibited a blood test ordered by a search warrant if the defendant refused the breath test. The statute in effect at that time stated, "If a person under arrest . . . refuses . . . to submit to any test allowed pursuant to §577.020, then none shall be given . . . " The Court of Appeals held that §577.041 was addressed to the authority of law enforcement officers to administer an alcohol test after a refusal. The court held that the statute was not addressed to the authority of courts issuing search warrants. *Smith, at 40.*Therefore the trial court's order suppressing the evidence was reversed.

What, then, is the effect of the legislature removing the words, "then none shall be given" from §577.041? Clearly, it removes any doubt that a blood test may be compelled by search warrant after a refusal by a drunken driving suspect, and so, the statute is now consistent with the holding in *Smith.*

The amendment would also reverse part of the holding of *State v. Ikerman, 698 S.W.2d 902 (Mo. App., E.D., 1985).* In *Ikerman,* the police obtained a warrantless blood sample incident to a de facto arrest. The Court of Appeals held (among other things) that the test result was inadmissible because the

defendant refused the test and §577.041 required that where the warrantless test was refused, "none shall be given." Those four words have been deleted, therefore, the amendment allows police to obtain a warrantless blood draw without consent – but only under certain circumstances.

The amendment of §577.041 does not and cannot overcome the holding in *Schmerber v. California,* and the holdings of the Missouri courts, that the Fourth Amendment requires either a warrant or exigent circumstances to withdraw blood without consent. "[A]bsent consent or exigent circumstances, law enforcement officers must obtain a warrant to conduct a search and seizure that would invade a constitutionally – protected privacy interest." *Smith, at 37.*

Although the Highway Patrol and the Prosecuting Attorney maintain that a search warrant is not necessary to draw blood after a DWI arrest, both hedge their advice to law enforcement officers about the circumstances when a warrant is not necessary. They do not have full confidence in their positions, and justly so. None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest when a warrant could be procured in a timely manner. None of the authorities submitted on this issue have held that the mere natural metabolization of alcohol from the defendant's blood – standing alone – amounts to exigent or special circumstances which justify a

warrantless blood draw under *Schmerber v. California.*

The motion is therefore sustained and the evidence obtained by the warrantless blood withdrawal is ordered suppressed.

3/03/2011	/s/
DATE	BENJAMIN F. LEWIS, CIRCUIT JUDGE

cc: Mr. Koester
Mr. Wilson

[SEAL]

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

March 6, 2012

BILL L. THOMPSON
INTERIM CLERK

TELEPHONE
(573) 751-4144

Mr. John N. Koester, Jr. via e-filing system
Office of Prosecuting Attorney
100 Court Street
Jackson, MO 63755

In Re: State of Missouri, Appellant, vs.
Tyler G. McNeely, Respondent.
Missouri Supreme Court No. SC91850

Dear Mr. Koester:

Please be advised the Court issued the following order on this date in the above-entitled cause: "Appellant's motion for rehearing overruled." Draper, J., not participating.

Very truly yours,

BILL L. THOMPSON

/s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:

Mr. Stephen C. Wilson	via e-filing system
Mr. Talmage E .Newton, IV	via e-filing system
Mr. Stephen D. Bonney	via e-filing system
Mr. Anthony E. Rothert	via e-filing system
Mr. James B. Farnsworth	via e-filing system